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SEAGATE TECHNOLOGY LLC

12 UNITED STATES DISTRICT COURT

13 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

15 IN RE SEAGATE TECHNOLOGY LLC
LITIGATION

17 CONSOLIDATED ACTION

Case No. 3:16-cv-00523-JCS

**SEAGATE'S OPPOSITION TO
PLAINTIFFS' MOTION FOR CLASS
CERTIFICATION**

Date: March 30, 2018
Time: 9:30 a.m.
Place: Courtroom G
Judge: Hon. Joseph C. Spero

Second Consolidated Amended Complaint
filed: July 11, 2016

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1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

2 Through two years of litigation, Plaintiffs claimed they were suing Seagate Technology LLC
 3 (“Seagate”) for allegedly selling model ST3000DM001 hard drives (the “Drives”) containing a
 4 “latent, model-wide defect” that allegedly caused them to fail prematurely and at a high rate. *E.g.*,
 5 Dkt. 62 (Second Consolidated Amended Complaint (SCAC)), ¶¶ 1, 4, 7, 9, 10, 11, 82-108. Indeed,
 6 Plaintiffs use variations of the word “defect” *over 185 times* in the SCAC. But at class certification,
 7 after forcing Seagate to spend more than \$1 million responding to discovery requests, Plaintiffs fail
 8 to identify any defect. Rather than admit they cannot establish a class-wide defect, Plaintiffs
 9 contend a class should still be certified on the entirely different theory that Seagate allegedly made
 10 material, class-wide “omissions” regarding the Drives’ supposed “unreliability.” *E.g.*, Dkt. 135 at
 11 viii (Statement of Issues); Memorandum of Points and Authorities (“MPA”) 2:1-2, 3:18-4:16.¹

12 This contention also fails. As the Ninth Circuit has recognized, California courts have
 13 “rejected a broad obligation to disclose” under the State’s consumer protection laws, such that an
 14 omission claim is actionable only if it (1) concerns information about safety the defendant had an
 15 affirmative duty to disclose, or (2) is contrary to an affirmative representation by the defendant.
 16 *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1141-43 (9th Cir. 2012) (absent affirmative
 17 misrepresentations, omission must pose safety risk to be material); *Williams v. Yamaha Motor Co.*,
 18 851 F.3d 1015, 1025-26 (9th Cir. 2017) (same); *Dana v. Hershey Co.*, 180 F. Supp. 3d 652, 663,
 19 666 (N.D. Cal. 2016) (same, citing cases). Here, Plaintiffs make no contention that the alleged
 20 omissions relate to a safety issue; therefore, Seagate could only have a duty to disclose material
 21 information contrary to an affirmative representation it previously made.

22 But the Court already ruled that most of the alleged affirmative misrepresentations either
 23 (1) “‘constitute ‘mere puffery’ upon which a reasonable consumer could not rely,’” or (2) were
 24 insufficiently alleged to be false. Order on Seagate’s Motion to Dismiss SCAC, Dkt. 100 at 23:9-
 25

26 ¹ Indeed, Plaintiffs appear to concede that no common defect exists, as they do not seek to
 27 certify their implied warranty claims. Moreover, their technical expert, Dr. Andrew Hospodor,
 28 tested *no Drives*, not even those of the named Plaintiffs. Instead, he reviewed a smattering of
 internal Seagate documents—many of which he misconstrues—to posit a series of *different*
 purported issues with different versions of the Drives at discrete points in time. Even then, he fails to
 connect any of the alleged problems to failures in the hands of consumers.

25:13 (“Order”). Plaintiffs are therefore left to argue that Seagate’s affirmative representations regarding the Drives’ annualized failure rate (“AFR”) and suitability for use in a redundant arrays of independent disks (“RAID”) obligated Seagate to disclose the Drives’ alleged “unreliability,” *e.g.*, MPA 4:17-10:5; 3:18-19. Even that limited claim is further curtailed because Plaintiffs’ damages expert Stefan Boedeker concedes, based on his conjoint study, that representations about suitability for RAID are immaterial to consumers’ purchasing decisions. Declaration of Stefan Boedeker ISO Pls.’ Mot. for Class Cert. (Boedeker Decl.) ¶¶ 145, 158; Payne Decl., Ex. 23 (Boedeker Depo.) at 284:11-17. Plaintiffs’ effort to certify a class thus hinges entirely on Seagate’s AFR representations, but the AFR evidence shows Plaintiffs cannot meet the standard for class certification.²

First, Plaintiffs fail to show (1) that Seagate made representations regarding AFR and/or RAID as to all—or even most—of the products containing the Drives included in the class definition over the alleged class period, or (2) that the AFR and RAID representations were made in the course of a large-scale advertising campaign that would permit a classwide presumption of exposure so as to give rise to a duty to disclose. *See Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 596 (9th Cir. 2012) (vacating class certification order because limited marketing campaign precluded presumption of exposure); *In re Clorox Consumer Litig.*, 301 F.R.D. 436, 444 (N.D. Cal. 2014) (denying certification under CLRA, UCL, FAL, and five state subclasses alternatively, because classwide presumption of exposure impossible where advertising campaign consisted of only 16-months of television commercials and representations on product packaging).

Most significantly, Plaintiffs’ own evidence shows that Seagate did not make representations regarding the ST3000DM001 drive as such. *See, e.g.*, Dkt. 136 (Berman Decl.), Exs. 2, 3 (Storage Solutions Guides showing specifications were made by product, not drive), 11, 12, 14-19. Rather, the alleged representations Plaintiffs argue created Seagate’s duty to disclose address the attributes of 12 *different* products that may have contained an ST3000DM001 drive.³ As set forth in Sections

² Although Plaintiffs’ own evidence shows RAID statements are immaterial to consumers’ purchasing decisions, Seagate addresses RAID representations herein in the course of analyzing differences in representations to which class members were exposed.

³ The products that did or could contain the ST3000DM001 include the Barracuda, Desktop HDD Internal Kit, BackUp Plus Mac, BackUp Plus Desk, Free Agent GoFlex Desk, GoFlex Desk for Mac, Free Agent GoFlex Home, Expansion Desk, Expansion Desk Plus, Business 1 Bay NAS,

II(A) and IV(A) below, Seagate made no AFR representations at all with regard to the majority of products containing the Drives, and even the AFR statements Seagate made (for a subset of the products) were buried in technical Data Sheets, Storage Solutions Guides, and Product Manuals available on Seagate’s website (but not on product packaging or in brick and mortar stores), which Plaintiffs make no effort to show the class saw, and which changed over time. Because of this absence of evidence of class-wide exposure, Plaintiffs’ damages expert, Boedeker, is reduced to advancing a nonsensical theory that whether class members were actually exposed to AFR representations is irrelevant—because the AFR information is supposedly reflected in the market price and consumers who purchased Drives are therefore “damaged” regardless of whether any misrepresentations were made *to them*. Section VI, *infra*. This is not the law. Plaintiffs must establish that material omissions were made *to class members* as a prerequisite to class certification. They have not done so. As a result, the proposed class is bloated with persons who were never exposed to Seagate’s AFR statements, to whom Seagate never owed a duty to disclose, and who could not possibly have been harmed by Seagate’s alleged omissions. Because Seagate did not make uniform, widespread, and material misrepresentations regarding the Drives, neither a classwide duty to disclose nor a presumption of classwide materiality or reliance can be found.

Second, the alleged omission must be contrary to a statement that was *false in some way common to the class* such that a *common duty to counter this affirmative representation* arose. Here, Plaintiffs claim Seagate published an allegedly false AFR of “<1%.” Assuming, *arguendo*,

Business 2 Bay NAS, and Business 4 Bay NAS. Plaintiffs’ class definition provides internal, chassis, and box numbers for these products at issue without tying these numbers to product names. Two of these products—the Barracuda (ST3000DM001), Desktop HDD Internal Kit (STBD3000100)—were internal hard drives (“Internal Products”), meaning they were purchased by consumers who then installed them into desktop computers or other storage devices. Any product that is not an Internal Product—the vast majority—is an external, backup hard drive (“External Products”). The External Products’ corresponding internal chassis and box numbers are as follows: Backup Plus Desk (STCA3000101, STDT3000400, STCA3000600, STDT3000402, STCA3000601, STFM3000400, STCA3000602, STDT3000100, STDT3000600, STFM3000100), Backup Plus for Mac (STCB3000100, STCB3000201, STCB3000400, STCB3000101, STCB3000401, STDU3000400, STCB3000900, STCB3000901, STDU3000101), Expansion Desk (STBV3000100, STEB3000400, STBV3000200, STEB3000100, STEB3000200, STAY3000100, STAY3000102), Expansion Desk Plus (STEG3000100, STCP3000400, STCP3000100, STEG3000400), GoFlex Desk for Mac (STBC3000101, STBC3000102), FreeAgent GoFlex Home (STAM3000100, STAM3000400), FreeAgent GoFlex Desk (STAC3000100, STAC3000102, STAC3000602, STAC3000404, STAC3000402, STAC3000202, STAC3000403), Business 1 Bay NAS (STBM3000100), Business 2 Bay NAS (STBN6000100), Business 4 Bay NAS (STBP12000100).

1 putative class members universally saw the <1% representation—which we know they did not—
2 Plaintiffs must show with evidence as to all versions of the Drives that each had a higher failure rate
3 than represented for that version and that such higher failure rate existed throughout the class period.
4 But even Plaintiffs’ technical expert, Hospodor, does not so contend. At most, his alleged evidence
5 of a higher failure rate is limited to a subset of Drives manufactured before 2013—and even as to
6 those Drives, the evidence does not establish falsity or commonality. The Court should give no
7 weight whatsoever to Hospodor’s opinion. Sections II(B), IV(B).

8 Third, this case is “materially indistinguishable” from *Mazza*, 666 F.3d at 581, and thus
9 Plaintiffs’ attempt to certify a nationwide class precludes a finding of predominance. Plaintiffs seek
10 to certify a nationwide class under the same statutes at issue in *Mazza*, thereby implicating the same
11 state interests that the Ninth Circuit found barred application of those laws to non-resident class
12 members. *See Kowalsky v. Hewlett-Packard Co.*, No. 5:10-cv-02176-LHK, 2012 WL 892427, at *7
13 (N.D. Cal. Mar. 14, 2012) (denying certification of UCL and CLRA claims where putative class
14 alleged HP marketed and sold printers without disclosing their unsuitability for copying multiple
15 sheets). Plaintiffs’ request for eight subclasses in the alternative also fails because Plaintiffs (1) do
16 not explain how a trial under the laws of eight states would proceed under Rule 23(b), when (2) the
17 consumer protection statutes of those states vary materially. *See* Section V.B. For these reasons, a
18 class action is neither superior nor a manageable method of resolving this dispute.

19 At bottom, Plaintiffs’ evidence does not support the claims remaining before the Court on
20 class certification. Plaintiffs cannot certify a class on the theory that, absent a common defect or a
21 common misrepresentation, Seagate’s drives had an “above-industry-standard failure rate.” Instead,
22 Plaintiffs’ request for certification is predicated on statutes that require Seagate to have committed
23 an act of consumer *deception* by making a common and material affirmative misrepresentation
24 (FAL), or by withholding information that relates to safety or is contrary to an affirmative
25 misrepresentation (CLRA, UCL). Plaintiffs fail to present evidence in support of a ***classwide***
26 misrepresentation or omission under any of these theories. Class certification should be denied.
27
28

1 **II. PLAINTIFFS' EVIDENCE IS NEITHER COMMON NOR MATERIAL TO THE**
 2 **PROPOSED CLASS**

3 **A. There Is No Evidence of a Widespread Marketing Campaign as to AFR or RAID**

4 Plaintiffs claim that Seagate advertised (1) AFRs “ubiquitously” on its website, in its Product
 5 Manuals, Data Sheets, and Storage Solutions Guide, despite the fact that the hard drives “had AFRs
 6 far below industry standard[.]” MPA 6:22-7:9, 8:3-4, and (2) that the Drives were “perfect for
 7 Desktop RAID” despite the fact that, in light of the alleged high failure rates, “these drives were . . .
 8 unsuitable for use in RAID[.]” *id.* at 9:11-14. However, Plaintiffs do not contend class members
 9 could have been exposed to these alleged misrepresentations anywhere but on Seagate’s website.
 10 See MPA 1:11-13, 6:24-7:5 & n.21. Plaintiffs do not allege, for example, that Seagate advertised
 11 the Drives’ AFRs or suitability for RAID through commercials or print advertising over long
 12 periods of time. Thus, Plaintiffs have failed to show a long-term and widespread marketing
 13 campaign similar to that considered in *In re Tobacco II Cases*, 46 Cal. 4th 298, 324-27 (2009).
 14 Indeed, Plaintiffs do not even come close to the months’-long television campaign, advertisements
 15 at dealerships and in print, product brochures, and online representations the court found insufficient
 16 to justify a classwide presumption of exposure and reliance in *Mazza*, 666 F.3d at 586-87, 594.

17 Moreover, Plaintiffs supply *no evidence* that Seagate engaged in a class-wide marketing
 18 campaign regarding AFR or RAID as to all products containing the Drives. Although Plaintiffs
 19 attempt to obfuscate their evidentiary deficiencies by referring generally to all 12 products at issue
 20 as the “Drives[.]” and citing product-specific materials interchangeably, their own evidence betrays
 21 the truth: Seagate made no representations for the ST3000DM001 drive as such, but rather
 22 separately marketed the twelve Internal and External Products that contained the Drives. Fochtman
 23 Decl. ¶ 5. A review of materials related to these twelve products shows substantial differences in
 24 representations regarding AFR and RAID:

- 25 • **AFR representations in Storage Solutions Guides, Product Manuals, and Data Sheets**
 26 **relate only to Internal Products, and varied over time.** Notwithstanding Plaintiffs’
 27 argument that Storage Solutions Guides, Data Sheets, and Product Manuals available
 28 through Seagate’s product detail webpages contained AFRs of <1% “throughout the class
 period[.]” MPA 6:24-7:5, *Plaintiffs’ evidence shows that Seagate only published AFRs for*
the two Internal Products during the limited time periods of April-November 2011, April
2012-January 2013, and September 2013-January 2014. See MPA 6:22-7:16 & n.21 (citing
Berman Decl., Exs. 2, 12, & 16 (incorrectly cited by Plaintiffs as Exhibit 17)) (Storage

Solutions Guides from May and July 2012 containing AFR specs for the Barracuda products); Berman Decl., Exs. 11, 13, 15 (Data Sheets for only the Internal Products); Berman Decl., Ex. 14 (screenshot of a specifications tab on the product detail webpage for the Barracuda product); Berman Decl., Exs. 17-19 (Barracuda Product Manuals, one of which is dated March 2016 and thus is outside the class period); Hospodor Decl. ¶¶ 44-58 (citing Seagate Data Sheets, Product Manuals, and web pages about Internal Products only).

- **Even for Internal Products, Product Manuals did not contain AFR representations until January 2015.** With regard to the Product Manuals specifically, Plaintiffs’ only evidence that “product manual[s], always available on Seagate’s website, stated [] these drives had an AFR of 0.34%” is a *draft* Barracuda Product Manual from April 2011 that was never published—as Plaintiffs’ counsel are well aware from depositions. MPA 6:24-7:1 (citing Hospodor Decl. ¶¶ 46-49); Schweiss Decl. ¶¶ 6-7; Atty Decl., Ex. 14 (Khurshudov Depo. at 67:3-68:1). The first publicly-available Barracuda Product Manual is dated August 2011 and contains no AFR representations. Schweiss Decl., Ex 2. Indeed, Barracuda Product Manuals did not become available on Seagate’s product detail webpage until October 2011. Payne Decl. ¶¶ 9-10. Moreover, the Product Manual did not contain an AFR representation until January 2015, after the Barracuda had been rebranded as the Desktop HDD. Berman Decl., Ex. 17 at 1 (*see* Document Revision History, Rev. L, stating “added AFR = <1%”); Schweiss Decl. ¶ 9, 11.⁴
- **There is no evidence Seagate made AFR representations as to any External Products.** Plaintiffs cite no representations whatsoever about the AFRs of External Products. *See above*, 5:28-29 (“AFR representations in Storage Solutions Guides, Product Manuals, and Data Sheets relate only to Internal Products, and varied over time.”). Indeed, there is no evidence that Seagate ever published AFRs for External Products. Schweiss Decl. ¶¶ 14-15, exs. 19-27; Fochtman Decl. ¶ 8; Payne Decl., ¶ 14. Nor did Seagate publish Product Manuals for such products. Schweiss Decl. ¶ 14.
- **AFR representations were never on product packaging.** Fochtman Decl., ¶ 8; Berman Decl., Exs. 8 (Plaintiff Nelson’s 2012 Backup Plus box), 9 (Seagate’s Product Packaging Guidelines, showing box artwork does not include AFR representations).
- **RAID representations varied over time and were made only as to Internal Products and Business 2- and 4-Bay NAS Products.** *See, e.g.*, Berman Decl., Exs. 2 (July 2012 Storage Solutions Guide, at 2-11, 18-19 with no RAID representations as to External Products; RAID representations only as to Barracuda and Barracuda 3.5 Inch Internal Kit); 3 (October 2013 Storage Solutions Guide, at 2-13, 33 with RAID representations only as to the Desktop 3.5 Inch Internal Kit, the 2-Bay NAS (“customize performance and data redundancy with RAID 0 and 1 configuration options”), and the 4-Bay NAS (“customize performance and data redundancy with RAID 0, 1, 5, and 10 configuration options”)); 4-6 (Backup Plus Data Sheets with no RAID or AFR representations); 7 (Backup Plus Desktop for Mac Data Sheet with no RAID or AFR representations); 11 (Barracuda Data Sheet without RAID representation); 12 (May 2012 Storage Solutions Guide, at 2-13 with RAID representations only as to Internal Products).

The evidence above shows, at best, intermittent AFR representations only as to Internal

⁴ A product manual is not necessarily posted on Seagate’s website immediately after finalization. Schweiss Decl., ¶ 13. Plaintiffs cite no evidence as to the timing of public availability.

1 Products, and intermittent RAID representations only as to Internal Products and the 2- and 4-Bay
 2 NAS Products. Plaintiffs have thus failed to show any widespread marketing campaign common to
 3 all covered products or all putative class members.

4 **B. There Is No Common Evidence of a High Failure Rate or Seagate’s Knowledge of Same**

5 The Court should exclude the declaration of Plaintiffs’ technical expert, Andrew Hospodor
 6 (“Hospodor Decl.”), because Hospodor merely speculates about the meaning of internal Seagate
 7 documents without offering any evidence of his own; his opinions thus do not meet even minimum
 8 standards of admissibility. *See* Section VII.⁵ Moreover, even if it were admissible, the Hospodor
 9 declaration fails to show either *common evidence* of a higher AFR or “unreliability,” or *common*
 10 *evidence* of Seagate’s knowledge of same, such as to give rise to a *common duty to disclose* to the
 11 proposed class as a whole. In fact, Plaintiffs’ evidence shows just the opposite.

12 Hospodor claims the “Drives” had a “higher than advertised” AFR. However, as noted,
 13 Seagate did not publish any AFR for the External Products and did so only intermittently for the
 14 Internal Products. Yet most of Hospodor’s evidence of an allegedly “high” AFR relates to the
 15 External Products. Declaration of Don Adams (“Adams Decl.”), § VI.A. With regard to the
 16 Internal Products, the documents show *below 1% AFRs* for Grenada Classic,⁶ BP and BP2 drives.
 17 *Id.*, § VI.B. At most, Hospodor cites two documents he claims show the Grenada *Classic* had an
 18 AFR above 1% *at two points in 2012*. *Id.*, § VI.C. However, Hospodor admits that later versions of
 19 Grenada—the Grenada BP and BP2—were significantly different drives, yet he cites no evidence
 20 that the Grenada BP or BP2 drives ever had an AFR above 1%. *Id.*, § VI.B, § VI.C; Dewey Decl.,
 21 ¶¶ 6, 15, 18; Payne Decl., Ex. 11 at 191:23-192:18. Hospodor’s claim that Seagate underestimated
 22 the “true” AFR of the Drives is based on inadmissible, unreliable methods and misinterpretations of
 23 a handful of Seagate documents (Section VII; Adams Decl. § VII), but even if it were not, Hospodor
 24 admits his purported evidence of an “increasing” Beta or AFR is limited to an eight month period in

25
 26 ⁵ “When a party seeks to exclude expert testimony or reports at the class certification stage,
 27 courts apply the *Daubert* standard to evaluate the challenged evidence.” *Senne v. Kan. City Royals*
 28 *Baseball Corp.*, 315 F.R.D. 523, 586-87 (N.D. Cal. 2016) (citing *Ellis v. Costco Wholesale Corp.*,
 657 F.3d 970, 982 (9th Cir. 2011).); *Kamakahi v. Am. Soc’y for Reprod. Med.*, 305 F.R.D. 164, 176
 (N.D. Cal. 2015) (same).

⁶ “Grenada” was the Seagate internal code name for the family of drives that included the
 ST3000DM001. *See, e.g.*, Declaration of Pat Dewey (“Dewey Decl.”), ¶ 6.

2011-2012. Payne Decl., Ex. 11 at 51:17-25; 224:15-225:4. The remainder of Hospodor’s purported evidence (relating to yields, ECRs, ship holds and the like) *does not establish that any Drives had an AFR above 1%*. Adams Decl., ¶¶ 23, 83, 89, 97, 103. Moreover, none of the purported issues affected more than a tiny minority of putative class members because, with one exception, the evidence is limited to Grenada *Classic* drives *in 2011-2012*.⁷ Adams Decl., § VIII, ¶¶ 23, 81.

Plaintiffs similarly fail to show there is common, admissible evidence of Seagate’s *knowledge* that any statement was false. Seagate did not make AFR statements about the External Products and thus cannot have known such non-existent statements were false. As to Internal Products, as explained above, Plaintiffs’ evidence of a “higher AFR” (or even “unreliability”) is limited to Grenada Classic drives in 2011-12. Plaintiffs offer no evidence of problems with any drives—let alone Seagate’s knowledge of same—at any other time or with any other drives.

III. LEGAL STANDARD

A class may be certified under Rule 23 of the Federal Rules of Civil Procedure only if all of the requirements of Rule 23(a) and one of the requirements of Rule 23(b) are met. *Senne*, 315 F.R.D. at 561. Under Rule 23(a), a class may be certified if the plaintiff demonstrates (1) numerosity; (2) commonality; (3) typicality; and (4) fair and adequate representation of the interests of the class. Fed. R. Civ. P. 23(a). Courts must engage in a “rigorous analysis” of Rule 23(a)’s requirements. *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 542-43 (9th Cir. 2013) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011)). In addition, because Plaintiffs invoke Rule 23(b)(3), they must also show that (1) common questions of law or fact predominate over individual questions, and (2) a class action is superior to other available methods of adjudicating the controversy. *Philips v. Ford Motor Co.*, No. 14-CV-02989-LHK, 2016 WL 7428810, at *6 (N.D. Cal. Dec. 22, 2016). Here, Plaintiffs have failed to satisfy the commonality, typicality, adequacy, predominance, and superiority requirements. Accordingly, certification should be denied.

⁷ The one exception is the Apple recall (of OEM drives not at issue) which may have covered Grenada BP drives manufactured in early 2013. Adams Decl., ¶ 106. Again, Plaintiffs offer no evidence that Apple’s concerns were common to any of the Drives used by consumers, as opposed to those installed in Apple’s unique computer systems.

1 **IV. PLAINTIFFS FAIL TO SATISFY THE ELEMENTS OF RULE 23(a)**

2 As discussed in Section II(A) and below, Plaintiffs fail to show that the putative class claims
 3 “depend upon a common contention” likely to generate “common *answers* apt to drive the
 4 resolution of this litigation.” *Wal-Mart*, 564 U.S. at 349-350. Nor have Plaintiffs satisfied their
 5 burden to show their claims are typical of the class, because (1) certain named plaintiffs are subject
 6 to unique defenses, as only Plaintiffs Hauff, Crawford, and Enders purchased their Drives at times
 7 when AFR representations were publicly available, *see Ellis v. Costco Wholesale Corp.*, 657 F.3d
 8 970, 984 (9th Cir. 2011) (citation omitted) (typicality not satisfied where action based on conduct
 9 unique to named plaintiffs and class members were not injured by same course of conduct); and (2)
 10 Plaintiffs did not purchase all products in the proposed class, and therefore could not have been
 11 harmed by any alleged omissions as to products they did not buy, *see Wiener v. Dannon Co.*, 255
 12 F.R.D. 658, 665-66 (C.D. Cal. 2009). Plaintiffs are also inadequate to the extent their claims are
 13 atypical of the class. Fed. R. Civ. P. 23(a)(4); *Valentino v. Carter-Wallace*, 97 F.3d 1227, 1234 (9th
 14 Cir. 1996) (“The named plaintiffs thus may not be able to provide adequate representation for those
 15 who have suffered different injuries.”); *Peviani v. Nat. Balance Inc.*, No. 3:10-CV-2451 AJB BGS,
 16 2011 WL 1648952, at *4 (S.D. Cal. May 2, 2011) (named plaintiff inadequate to extent her claims
 17 were not “reasonably co-extensive with those of absent class members”).

18 **A. Because Putative Class Members’ Exposure to Seagate’s Representations and**
 19 **Purported Omissions Is Not Common, There Can Be Neither a Classwide Duty to**
 20 **Disclose Nor A Classwide Presumption of Materiality or Reliance**

21 Even assuming there were common evidence of an AFR above 1% for the Drives over the
 22 class period—which, as set forth above and in Section IV.B below, there is not⁸—Seagate had a
 23 duty to disclose such evidence only to members of the class *who saw the allegedly false AFR*
 24 *statements*. This is true under each of Plaintiffs’ consumer protection claims. *See Doe v.*

25 ⁸ Hospodor concedes that his statement about the Drives’ failure rate increasing over time is
 26 limited to an early version of the internal Barracuda drive during an eight-month period beginning in
 27 April 2011 and that his data cannot be used to extrapolate beyond that period. Payne Decl., Ex. 11
 28 (Hospodor Depo.), 52:7-25. Moreover, even if Seagate had made AFR representations for its
 External Products—and there is no evidence that it did—Plaintiffs offer no evidence that any of
 these products had higher-than-advertised failure rates. Accordingly, a determination of the truth or
 falsity of Seagate’s AFR representations will not “resolve an issue that is central to the validity of
 each [claim] with one stroke” in the absence of evidence of either: (1) a contrary AFR representation
 to which all class members were exposed, or (2) higher-than-advertised failure rates as to all Drives.

1 *SuccessfulMatch.com*, 70 F. Supp. 3d 1066, 1076 (N.D. Cal. 2014) (explaining that, “for a plaintiff
 2 to bring UCL and CLRA claims on the basis of omissions, the omission must either be ‘contrary to a
 3 representation actually made by the defendant, or an omission of a fact the defendant was obliged to
 4 disclose’”) (citation omitted); *Daugherty v. Am. Honda Motor Co.*, 144 Cal. App. 4th 824, 835
 5 (2006) (“[A]lthough a claim may be stated under the CLRA in terms constituting fraudulent
 6 omissions, to be actionable the omission must be *contrary to a representation actually made by the*
 7 *defendant*, or an omission of a fact the defendant was obliged to disclose.”) (emphasis added); *Dana*
 8 *v. Hershey Co.*, 180 F. Supp. 3d 652, 664, 669 (N.D. Cal. 2016) (duty to disclose under CLRA
 9 limited to issues of product safety unless necessary to counter affirmative representation, and
 10 omissions claim under FAL must involve “*some* affirmative misrepresentation”).

11 Because the AFR and RAID information is not safety-related, Seagate can at most have had
 12 a duty to disclose the Drives’ alleged “true AFR” or “unreliability” to those class members to whom
 13 Seagate “actually made” an affirmative representation. However, exposure to such representations
 14 has not been shown, and cannot be presumed, on a classwide basis. Indeed, “[f]or everyone in the
 15 class to have been exposed to the omissions ... *it is necessary for everyone in the class to have*
 16 *viewed the allegedly misleading advertising.*” *Mazza*, 666 F.3d at 596 (emphasis added); *Cohen v.*
 17 *DirecTV, Inc.*, 178 Cal. App. 4th 966, 980 (2009) (“we do not understand the UCL to authorize an
 18 award . . . on behalf of a consumer who was never exposed in any way to an allegedly wrongful
 19 business practice”). Where, as here, there is no widespread marketing campaign, “it is unreasonable
 20 to assume that all class members viewed” the allegedly deceptive statements. *Mazza*, 666 F.3d at
 21 596 (citing *Pfizer Inc. v. Superior Court*, 182 Cal. App. 4th 622, 633-34 (2010)). Further, when
 22 plaintiffs are exposed to “‘quite disparate information,’ . . . a presumption of reliance is
 23 inappropriate.” *Philips*, 2016 WL 7428810, at *16 (individual issues predominated under CLRA
 24 and UCL where class members were not exposed to “uniform representations” about vehicle’s
 25 EPAS system); *Darisse v. Nest Labs, Inc.*, No. 5:14-cv-01363-BLF, 2016 WL 4385849, at *5-6
 26 (N.D. Cal. Aug. 15, 2016) (denying certification under UCL, CLRA, and FAL, in part, because
 27 classwide inference of reliance was impossible where no uniform misrepresentations were made);
 28 *Davis-Miller v. Automobile Club of S. Cal.*, 201 Cal. App. 4th 106, 125 (2011) (same).

As discussed in Section II(A) above, AFR and RAID representations were not uniformly published as to each of the products containing the Drives. Indeed, Plaintiffs’ sole evidence of a “widespread” campaign involving AFRs is an unrepresentative sample of Storage Solutions Guides, Data Sheets, Product Manuals, and specifications tabs on product detail webpages concerning only the Internal Products, and for three specific and limited time frames: April-November 2011, April 2012-January 2013, and September 2013-January 2014. Thus, an External Product purchaser would never have been exposed to an AFR representation, and would only have been exposed to a RAID representation to the extent she purchased a Business 2- or 4-Bay NAS product. An Internal Product purchaser who relied on the Product Manual to make her purchasing decision would not have been exposed to an AFR representation *unless* she viewed the Product Manual after January 2015. Because putative class members’ exposure to representations about the Drives, and the representations themselves, varied among products and over the class period, (1) any duty to disclose information countering affirmative representations cannot be a common issue, and (2) materiality and/or reliance on any purported omissions cannot be presumed on a classwide basis.

B. The Alleged Unreliability of the Drives Is Not a Common Issue

Similarly, the alleged unreliability of the Drives is not a common issue. *At its very best* Plaintiffs’ evidence is that the failure rates of the drives varied by product iteration and over time. Specifically, Hospodor’s evidence shows that that the Grenada BP and BP2 drives had AFRs of less than 1%, and he offers no evidence that this ever changed. Section II(B), *supra*; Adams Decl., § VI.B. Moreover, Plaintiffs provide no evidence that any drives manufactured after 2012 had an AFR over 1%.⁹ Even as to drives manufactured *in* 2012, Plaintiffs’ evidence is confined to the Grenada Classic. Because sales of Grenada Classic and Grenada BP overlapped in 2012, even limiting the class to pre-2013 would not be sufficient. *See* Dewey Decl., ¶ 18; Payne Decl., Ex. 4 at p. 26787 (Grenada BP production expected to equal that of Grenada Classic around September 2012).) Any attempt to sort out which consumers were exposed to which statements about which products would involve an overwhelmingly large number of individualized determinations.

⁹ As explained, Plaintiffs’ evidence of “unreliability” is inadmissible and irrelevant. Section II(B); Section VII. Regardless, with one exception *it too is confined to Grenada Classic drives manufactured in 2011-2012*. Section II(B), Adams Decl., § VIII, ¶¶ 23, 81.

C. Materiality Is Not a Common Issue

Absent a safety concern, Seagate’s AFR statements must constitute a misrepresentation to be material. *See Wilson*, 668 F.3d 1136 at 1141-43. Therefore, any duty on Seagate’s part to disclose the Drives’ “true” failure rate is limited to class members who actually saw the AFR. *Mazza*, 666 F.3d at 595 (California law does not “authorize an award . . . on behalf of a consumer who was never exposed in any way to an allegedly wrongful business practice.”) (quoting *Cohen v. DirecTV, Inc.*, 178 Cal. App. 4th 966, 980 (2009)). *See* Section II(A), *supra*. Notably, Seagate’s survey expert, Itamar Simonson, determined that consumers who were exposed to the allegedly false AFR statements found a “higher” AFR to be immaterial to their purchasing decisions, Simonson Decl. ¶ 37, while Plaintiffs’ expert Boedeker argued (incorrectly) that exposure is irrelevant. *See* Section VI, *infra*. The materiality of a “higher” AFR is the heart of Plaintiffs’ theory—for class certification and on the merits—yet Plaintiffs offer no common evidence on this point.

D. The Class Representatives Are Atypical and Inadequate to the Extent Their Claims Are Subject to Unique Defenses and They Lack Standing

To establish typicality, Plaintiffs must demonstrate that: (1) “other members have the same or similar injury;” (2) “the action is based on conduct which is not unique to the named plaintiffs;” and (3) “other class members have been injured by the same course of conduct.” *Ellis*, 657 F.3d at 984 (remanding to district court for renewed consideration of typicality where named plaintiffs were subject to unique defenses). Here, named plaintiffs’ claims are atypical for the following reasons.

First, although most named plaintiffs purport to have relied on AFR representations, the record shows that this is impossible as to plaintiffs Nelson, Schechner, Hagey, Manak, and Dortch because *there is no evidence AFR representations were publicly available* at the time they purchased their Drives.¹⁰ Further, Plaintiffs Schechner and Nelson are the only named plaintiffs who purchased External Products. SCAC, ¶¶ 135, 162. Both claim to have relied on representations

¹⁰ There is no evidence of published AFRs when Plaintiffs Nelson and Schechner purchased their Backup Plus products. Payne Decl., Ex. 28 (Schechner Deposition, 103:20–104:17), Ex. 29 (Nelson Deposition, 112:23–113:15); SCAC ¶¶ 135, 162. Nor is there any evidence of published AFRs when Plaintiffs Hagey, Manak, and Dortch purchased their Barracuda products. *See* Section II(A), *supra*; SCAC ¶¶ 174, 211, 232. Only Plaintiffs Hauff, Crawford, and Enders purchased products within the time frames for which Plaintiffs offer evidence of published AFR representations. *See* Section II(A), *supra*; SCAC ¶¶ 149, 186, 223.

1 for the *Barracuda* product, *not* the Backup Plus products they purchased. Payne Decl., Ex. 28
 2 (Schechner Deposition, 103:20–104:17), Ex. 29 (Nelson Deposition, 112:23–113:15). Both testified
 3 they knew the Backup Plus contained the Barracuda internal drive, *id.*, but it is unclear how they
 4 knew this given that Seagate’s webpages, Data Sheets, and Storage Solutions Guides never listed the
 5 internal drive for External Products, and no Product Manuals were published for External Drives
 6 during the alleged class period. Fochtman Decl. ¶ 6; Schweiss Decl. ¶ 14-15, Exs. 19-27. Putting
 7 aside this credibility issue, if Schechner and Nelson did somehow link the Barracuda AFR with the
 8 Backup Plus products, they would be atypical of other class members as there is no evidence anyone
 9 else did so.¹¹ Accordingly, Plaintiffs Nelson, Schechner, Hagey, Manak, and Dortch are atypical.

10 Further, only five of the named plaintiffs purchased Barracuda products for use in RAID
 11 arrays and thus claim to have relied on Seagate’s statements about the drives’ suitability for RAID.
 12 *See* SCAC, p. 29, ¶ 187 (Crawford used the Barracuda in his RAID 5 system); *Id.* at 25, ¶ 156
 13 (Hauff used the Barracuda in a NAS system); *Id.* at 34, ¶ 224 (Enders used the Barracuda in his
 14 home NAS, which used a RAID configuration); *Id.* at 36, p. 236 (Dortch used the Barracuda in his
 15 NAS which was configured in RAID 5); Payne Decl., Ex. 22 (Manak Deposition, 135:17-136:10)
 16 (Manak intended to use the drives in a RAID configuration). Plaintiff Hagey also purchased a
 17 Barracuda product, but despite not using the Barracuda for a RAID array, stated he nevertheless
 18 relied on Seagate’s statements about RAID suitability. Payne Decl., Ex. 30 (Hagey Deposition,
 19 75:10-76:17). That only five of the eight Plaintiffs say they relied on RAID representations shows
 20 the relevance of RAID is not common to the class. Indeed, Plaintiffs’ expert Boedeker confirmed in
 21 his conjoint study that RAID representations are immaterial to consumers. Accordingly, the five
 22 Plaintiffs’ alleged reliance on RAID representations is atypical. *See* Boedeker Decl., p. 47, Figure
 23 20; Payne Decl., Ex. 23 (Boedeker Depo. at 284:11-17); Simonson Decl. ¶ 9 n.6.

24 Finally, Plaintiffs cannot establish typicality because they purchased only two of the 12

25
 26 ¹¹ Plaintiff Schechner claims he relied on the Barracuda Data Sheet because he knew that the
 27 Barracuda drive was in the Backup Plus—though he “couldn’t even tell you” where he got such
 28 information. Payne Decl., Ex. 28 (Schechner Depo.) at 103:20-104:17; 106:7-19. Plaintiff Nelson
 “believe[s]” that he relied on the Barracuda Data Sheet because “[t]he Barracuda is a different
 nomenclature, but it’s the same drive Or at least that’s what I was led to believe.” Payne Decl.,
 Ex. 29 (Nelson Depo.) at 112:23-113:15. Mr. Nelson provides no basis for this belief. *See id.* at
 112:13-114:25; MPA 13:4-6; SCAC ¶¶ 135-148.

1 products at issue: the Barracuda and Backup Plus.¹² As a result, they lack standing to pursue claims
 2 for 10 of the products. *See Johns v. Bayer Corp.*, No. 09CV1935 DMS (JMA), 2010 WL 476688, at
 3 *5 (S.D. Cal. Feb. 9, 2010) (plaintiff had standing to sue under UCL and CLRA only as to men's
 4 health vitamin he purchased, but no other vitamin products, even where other products contained the
 5 same alleged defect and were part of same advertising campaign); *Mlejnecky v. Olympus Imaging*
 6 *Am. Inc.*, No. 2:10-CV-02630 JAM, 2011 WL 1497096, at *4 (E.D. Cal. Apr. 19, 2011) (named
 7 plaintiff lacked standing to bring claims for products she did not purchase); *Carrea v. Dreyer's*
 8 *Grand Ice Cream, Inc.*, No. 10-1044 JSW, 2011 WL 159380 (N.D. Cal. Jan. 10, 2011) (same).
 9 Under California substantive law, a plaintiff who lacks standing to represent the entire class is
 10 inadequate. *See, e.g., Pfizer Inc.*, 182 Cal. App. 4th at 633-34 (vacating certification of UCL and
 11 FAL claims because named plaintiff was inadequate to represent class of all purchasers of Listerine
 12 where he viewed advertising related to only some Listerine products). Likewise here, the named
 13 plaintiffs were exposed to representations about only two of the 12 products at issue—the Barracuda
 14 and the Backup Plus. Thus, the named plaintiffs cannot seek relief for alleged
 15 misrepresentations/nondisclosures as to the remaining 10 products. Moreover, because they are
 16 subject to this unique standing defense, named plaintiffs are both atypical and inadequate.

17 **V. PLAINTIFFS FAIL TO SATISFY THE ELEMENTS OF RULE 23(b)**

18 The predominance test of Rule 23(b)(3) “is far more demanding” than the commonality test
 19 of Rule 23(a)(2). *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 624 (1997). The presence of
 20 common issues of fact or law sufficient to satisfy Rule 23(a)(2) is not enough to show those issues
 21 predominate. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998). “Where, after
 22 adjudication of the classwide issues, plaintiffs must still introduce a great deal of individualized
 23 proof or argue a number of individualized legal points to establish most or all of the elements of
 24 their individual claims, such claims are not suitable for class certification under Rule 23(b)(3).”
 25 *Faulk v. Sears Roebuck & Co.*, No. 11-CV-02159 YGR, 2013 WL 1703378, at *5 (N.D. Cal. Apr.

26
 27 ¹² There are no remaining named plaintiffs who purchased the Desktop HDD Internal Kit,
 28 the Backup Plus for Mac, the Expansion Desk, the Expansion Desk Plus, the GoFlex Desk for Mac,
 the FreeAgent GoFlex Desk, the FreeAgent GoFlex Home, the Business 1 Bay NAS, the Business 2
 Bay NAS, or the Business 4 Bay NAS products.

19, 2013) (internal quotations omitted).

A. Common Legal Issues Do Not Predominate Because Nationwide Application of California Law Is Prohibited by *Mazza* and California’s Choice of Law Principles

In *Mazza*, 666 F.3d at 594, the Ninth Circuit vacated certification of a nationwide class under the UCL, FAL, and CLRA. Plaintiffs alleged, *inter alia*, that Honda had failed to disclose that its Collision Mitigation Braking System may not under certain conditions warn drivers of a potential collision in time to avoid it. *Id.* at 587. In concluding that common issues did not predominate, the court recognized that although “California ha[d] a constitutionally sufficient aggregation of contacts to the claims of each putative class member[,]” California’s governmental interest test required “each class member’s consumer protection claim . . . be governed by the consumer protection laws of the jurisdiction in which the transaction took place.” *Id.* at 590, 594. Applying the test, the court first held there was a material conflict between California’s consumer protection laws and those of the 43 other states at issue because (1) such laws have different scienter requirements, (2) some require reliance, while others do not, and (3) they provide different remedies. *Id.* at 591.

Second, the *Mazza* court, relying on principles of federalism and California’s stated policy that a “jurisdiction ordinarily has ‘the predominant interest’ in regulating conduct that occurs within its borders[,]” determined that there was a true conflict between the laws of California and those of the other states, as each had “a strong interest in applying its own consumer protection laws” to residents. *Id.* at 592 (quoting *McCann v. Foster Wheeler*, 48 Cal. 4th 68, 97 (2010)).¹³ Thus, the court reasoned, “each class member’s consumer protection claim should be governed by the consumer protection laws of the jurisdiction in which the transaction took place” as those states’ interests in “calibrat[ing] liability to foster commerce” would be impaired by application of California’s laws. *Id.* at 593-94. Because multiple states’ laws applied, variances in state laws overwhelmed common issues and precluded a finding of predominance. *Id.* at 596.

Here, “plaintiffs concede that material differences exist between the state laws” of California

¹³ Indeed, the California Supreme Court has articulated a presumption against extraterritorial application of California’s laws: “[W]e presume the Legislature did not intend a statute to be operative, with respect to occurrences outside of the state, . . . unless such intention is clearly expressed.” *Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191, 1207 (2011) (internal citation and quotation marks omitted); *Norwest Mortg., Inc. v. Super. Ct.*, 72 Cal. App. 4th 214, 222 (1999) (same).

1 and the 49 other states whose consumers Plaintiffs seek to represent, “such that they would have a
 2 significant effect on the outcome of the litigation or ‘significantly alter the central issue of the
 3 manner of proof in this case.’” MPA 17:6-8 (citing *Keilholtz v. Lennox Hearth Prods. Inc.*, 268
 4 F.R.D. 330, 340 (N.D. Cal. 2010)). This concession is proper as courts applying *Mazza* have
 5 routinely held that there are material differences in states’ consumer protection laws.¹⁴ Given these
 6 differences, to demonstrate that “foreign law, rather than California law, should apply to class
 7 claims” Seagate need only show that (1) given the differences in the affected jurisdictions’ laws, a
 8 true conflict exists among the states’ interests in applying their own laws, and (2) the foreign states’
 9 interests would be more impaired if they were to be subordinated to California’s policy.
 10 *Washington Mut. Bank, FA v. Super. Ct.*, 24 Cal. 4th 906, 919-20 (2001); *McCann*, 48 Cal. 4th at
 11 87. These requirements are easily satisfied.

12 Under the state interest prong, courts find that where a plaintiff “alleges that consumers from
 13 all states were defrauded into buying a product in their state, all 50 states have an interest in having
 14 their own laws applied to the consumer transactions that took place within their borders.” *Marsh v.*
 15 *First Bank of Delaware*, No. 11-cv-05226-WHO, 2014 WL 2085199, at *6 (N.D. Cal. May 19,
 16 2014) (internal formatting omitted) (citing *Gianino*, 846 F. Supp. 2d at 1102).¹⁵ By contrast,
 17 California’s interest in applying its law to residents of foreign states is attenuated.¹⁶ Indeed,
 18

19 ¹⁴ See, e.g., *Wolf v. Hewlett Packard Co.*, No. CV 15-01221 BRO (GJSx), 2016 WL
 20 7743692, at *14-15 (C.D. Cal. Sept. 1, 2016) (California law could not apply because variances in
 21 state consumer protection statutes were material and outcome-determinative); *Darisse*, 2016 WL
 22 4385849, at *10-15 (detailing differences in consumer protection laws); *Gianino v. Alacer Corp.*,
 23 846 F. Supp. 2d 1096, 1102-03 (C.D. Cal. 2012) (collecting cases and detailing variations in
 24 scienter, reliance, injury, pre-filing notice, statutes of limitation, and damages requirements); *In re*
 25 *Hitachi Tele. Optical Block Cases*, No. 08cv1746, 2011 WL 9403, at *6 (S.D. Cal. Jan. 3, 2011)
 26 (“There are material conflicts between California’s consumer protection laws and the consumer
 27 protection laws of the other forty-nine states”); *Ralston v. Mortgage Investors Group, Inc.*, No.
 28 5:08-cv-00536-JF (PSG), 2012 WL 1094633, at *3-4 (N.D. Cal. Mar. 30, 2012) (in omissions case
 under UCL, limiting certification to California residents, relying on *Mazza* and *Gianino*). See also
 Payne Decl., Ex. 25 (50 state consumer protection statute survey).

¹⁵ See also *In re Yahoo Mail Litig.*, 308 F.R.D. 577, 602-03 (N.D. Cal. 2015) (each state had
 an interest in applying its own wiretapping statute to class members’ claims, which means that ‘if
 California law were applied to [a nationwide class], foreign states would be impaired in their ability
 to calibrate liability to foster commerce.”); *Lewallen v. Medtronic USA, Inc.*, No. C 01-20395
 RMW, 2002 WL 31300899, at *5 (N.D. Cal. Aug. 28, 2002) (“each of the fifty states may have an
 interest in seeing that its law is applied in an action involving one of its own injured citizens”).

¹⁶ See, e.g., *Edgar v. MITE Corp.*, 457 U.S. 624, 644 (1982) (“While protecting local
 investors is plainly a legitimate state objective, the State has no legitimate interest in protecting

1 California courts have acknowledged that “with respect to regulating or affecting conduct within its
 2 borders, the place of the wrong”—here, the state in which the last event necessary to make the actor
 3 liable occurred (*i.e.*, the state of purchase)—“has the predominant interest” in having its laws
 4 applied. *Hernandez v. Burger*, 102 Cal. App. 3d 795, 802 (1980), *cited with approval in Abogados*
 5 *v. AT&T, Inc.*, 223 F.3d 932, 935 (9th Cir. 2000).

6 Plaintiffs attempt to side-step this analysis by contending that “no state has an interest in
 7 limiting the liability of [Seagate] other than California” MPA 18:7-9. This argument was
 8 flatly rejected in *Mazza*: “[i]n concluding that no foreign state has ‘an interest in denying its citizens
 9 recovery under California’s potentially more comprehensive consumer protection laws,’ ***the district***
 10 ***court erred by discounting or not recognizing each state’s valid interests in shielding out-of-state***
 11 ***businesses from what the state may consider to be excessive litigation.***” *Mazza*, 666 F.3d at 592
 12 (emphasis added) (citing *McCann*, 48 Cal. 4th at 91). Moreover, Seagate has substantial facilities in
 13 other states, each of which would also have a strong interest in regulating its conduct. *See, e.g.*,
 14 Schweiss Decl. ¶ 3 (Product Manuals and Data Sheets drafted in Oklahoma); Almgren Decl. ¶ 2
 15 (Colorado); Dewey Decl. ¶ 3 (same); Paneno Decl. ¶ 2 (Minnesota).¹⁷ These states’ interests would
 16 be frustrated by blanket application of California’s laws.

17 Finally, under the comparative impairment prong, “with respect to regulating or affecting
 18 conduct within its borders, the place of the wrong has the predominant interest.” *Mazza*, 666 F.3d at
 19 593 (citations omitted) (where plaintiffs alleged Honda failed to disclose brake defect at point of
 20 sale, state where product was sold had prevailing interest).¹⁸ Plaintiffs misconstrue “the place of the
 21 wrong” as the state “from where the advertising scheme, including the omissions, emanated.” MPA

22
 23 nonresident shareholders”); *Mazza*, 666 F.3d 594 (notwithstanding that Honda is a California
 24 corporation and the allegedly unlawful advertising “emanated” from California, the court
 “disagree[d] . . . that applying California law to the claims of foreign residents concerning acts that
 took place in other states where cars were purchased or leased is necessary”).

25 ¹⁷ *See also Jobs at Seagate*, seagate.com, <https://www.seagate.com/jobs/culture/> (last visited
 26 Jan. 1, 2018) (listing locations in the Americas as including, among others, facilities in Longmont,
 Colorado; Bloomington and Shakopee, Minnesota; Oklahoma City, Oklahoma; Tigard, Oregon;
 Lake Mary, Florida; Schaumburg, Illinois; and Round Rock, Texas).

27 ¹⁸ *See also McCann*, 48 Cal. 4th at 94 n.12 (geographic location of an omission is place of
 28 transaction where it should have been disclosed); *Zinn v. Ex-Cell-O Corp.*, 148 Cal. App. 2d 56, 80
 n.6 (1957) (in fraud case, place of wrong was state where misrepresentations were communicated,
 not state where intention to misrepresent was formed or where misrepresented acts took place).

18:13-16. This was precisely the argument raised by the dissent in *Mazza*, which the majority rejected. 666 F.3d at 598 (Nelson, J., dissenting). Here, the conduct giving rise to Seagate’s alleged liability was its communication of AFR representations, which gave rise to a duty to disclose allegedly higher failure rates. This asserted harm occurred at the point of purchase, not the place the purported intention to omit information was formed or from which the AFR statements emanated.

“*Mazza* is materially indistinguishable from this case” See *Kowalsky*, 2012 WL 892427, at *7. Plaintiffs’ claims arise under the same statutes and involve the same state interests. Accordingly, the result must be the same: California law cannot be applied on a nationwide basis, and each class member’s claims must be governed by the laws of the state of purchase. Because “the applicable law” in this case “derives from the law of the 50 states . . . differences in state law will ‘compound the [] disparities’ among class members from the different states[.]” rendering individual issues predominant, and the class unmanageable.¹⁹ *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001) (citation omitted).

B. Individual Legal Issues Predominate Under the Laws of the Eight Proposed Sub-Class States As Well

Plaintiffs’ fallback request to certify sub-classes for the eight states in which they reside does not overcome the lack of predominance of legal issues. It is axiomatic that a class proponent must provide “a suitable and realistic plan for the trial of the class claims” *Marsh*, 2014 WL 2085199, at *8; see also *Grayson v. 7-Eleven, Inc.*, No. 09-cv-1353 MMA (WMc), 2011 WL 2414378, at *3 (S.D. Cal. June 10, 2011) (where laws of multiple states apply, party seeking certification must “creditably demonstrate, through an ‘extensive analysis’ of state law variances, ‘that class certification does not present insuperable obstacles’”). Here, Plaintiffs *assume* California law will apply, notwithstanding their alternative pleading of eight state subclasses. Indeed, Plaintiffs fail to argue, let alone present a trial plan, as to how common questions under eight states’

¹⁹ None of Plaintiffs’ citations supports a contrary result. Significantly, Plaintiffs cite only pre-*Mazza* cases in support of their nationwide class arguments except for *Opperman v. Path, Inc.*, 2016 WL 3844326, at *6-7 (N.D. Cal. July 15, 2016), which applies California’s governmental interest test to a completely different statute. MPA 14:16-19:2.

laws will predominate at trial.²⁰ Instead, Plaintiffs provide an Appendix that surveys, without analysis, (1) intent and reliance requirements, (2) the scope of claims permitted, and (3) the damages permitted under eight states' laws. Dkt. 147. This falls short of the realistic plan for trial of class claims Plaintiffs are required to present. Accordingly, Plaintiffs' subclasses are void *ab initio*.

In any event, the consumer protection laws of the proposed eight subclasses vary materially, and thus a class trial would present insurmountable challenges. For example:

Injury/Deception Requirements: South Carolina requires that any alleged unfair or deceptive act must affect the "public interest." *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 638 (2013). In Texas, deception occurs when a statement has a tendency "to deceive the ignorant, the unthinking, and the credulous who do not stop to analyze but are governed by appearances and general impressions." *Streber v. Hunter*, 221 F.3d 701, 728 (5th Cir. 2000); *RRTM Rest. Corp. v. Keeping*, 766 S.W.2d 804, 808 (Tex. App. 1988), writ denied (Sept. 6, 1989) (citing *Spradling v. Williams*, 566 S.W.2d 561, 562 (Tex. 1978)). By contrast, California applies a "reasonable man standard." *E.g., In re Toyota Motor Corp.*, 2011 U.S. Dist. LEXIS 52529 (C.D. Cal. May 13, 2011).

Reliance Requirement: Plaintiffs' Appendix erroneously states that South Dakota and Texas do not require reliance. They do. *See Rainbow Play Sys., Inc. v. Backyard Adventure, Inc.*, 2009 WL 3150984, at *7 (D.S.D. Sept. 28, 2009) (South Dakota Deceptive Trade Practices Act requires that "a plaintiff must have relied on the alleged misrepresentation"); Tex. Bus. & Com. Code Ann. § 17.50 (a) (West) (same). Although Florida's law does not require reliance, Plaintiffs must still show *causation* such that class certification is improper if there are "many differences in the facts supporting the claims of individual plaintiffs." *Egwuatu v. S. Lubes, Inc.*, 976 So. 2d 50, 53 (Fla. App. Dist. Ct. 2008). *Davis v. Powertel, Inc.*, 776 So. 2d 971 (Fla. 1st Dist. Ct. App. 2000), upon which Plaintiffs rely, has been criticized to the extent it suggests otherwise. *See, e.g., Pop's Pancakes, Inc. v. NuCO2, Inc.*, 251 F.R.D. 677, 686-87 (S.D. Fla. 2008); *Philip Morris USA Inc. v. Hines*, 883 So. 2d 292, 294 (Fla. Dist. Ct. App. 2003); *see also In re Clorox Consumer Litig.*, 301 F.R.D. at 448 (denying certification of Florida subclass and explaining *Powertel* has been criticized for failure to analyze causation). California's UCL requires named plaintiffs to show actual reliance, *Tobacco II*, 46 Cal.4th at 328, while the CLRA requires reliance as to the class, *see Cohen v. DIRECTV, Inc.*, 178 Cal. App. 4th 966, 980 (2009); *Daniel v. Ford Motor Co.*, 806 F.3d 1217, 1225 (9th Cir. 2015).

Scope of Omission Claim/Knowledge Requirements: Under Texas's consumer protection act, an omission must be as to information known to the defendant at the time of the transaction and intended to deceive the consumer. Tex. Bus. & Com. Code Ann. § 17.46(7) (West). By contrast, under Massachusetts G.L. c. 93, an "action based on deceptive acts or practices does not require . . . knowledge on the part of the defendant that the representation was false." *Aspinall v. Philip Morris Co., Inc.*, 442 Mass. 381, 394 (2004).

²⁰ Plaintiffs are not allowed to do so on reply. *Rollins v. Dignity Health*, 19 F. Supp. 909, 918 (N.D. Cal. 2013) (citing *United States ex rel. Giles v. Sardie*, 191 F. Supp. 2d 1117, 1127 (C.D. Cal. 2000) ("It is improper for a moving party to introduce new facts or different legal arguments in the reply brief than those presented in the moving papers.")).

Statutes of Limitations: Statutes of limitations for consumer protection laws vary significantly from 2 to 10 years among the states: 2 years (TX); 3 years (CA (CLRA, FAL), NY, SC); 4 years (CA (UCL), FL, MA, SD); 5 years (TN). *See In re Toyota Motor Corp.*, 785 F. Supp. 2d 925, 933 (C.D. Cal. 2011).²¹

Class Actions/Private Right of Action: South Carolina and Tennessee, two of the proposed subclass states, do not permit class actions under their consumer protection laws. *See* S.C. Code § 39-5-140; *Dema v. Tenet Physician Servs.-Hilton Head, Inc.*, 383 S.C. 115, 123 (2009) (“Federal courts have recognized that class actions may not be brought pursuant to SCUTPA”); Tenn. Code Ann. § 47-18-109 (West) (“Any person who suffers an ascertainable loss of money or property . . . by another person of an unfair or deceptive act or practice described in § 47-18-104(b) . . . may bring an action individually to recover actual damages.”); *see also Walker v. Sunrise Pontiac-GMC Truck, Inc.*, 249 S.W.3d 301, 310 (Tenn. 2008) (class actions prohibited under Tennessee consumer statute).

Remedies/Relief: Available remedies also vary materially. While some states permit recovery of damages, including MA, SD, TX, and CA under the CLRA, other states limit the available remedies to equitable or restitutionary relief, including CA (UCL, FAL). In addition, several states do not permit punitive damages, including CA (UCL, FAL), SC, SD, TN. *See Payne Decl.*, Ex. 25.

Given these substantial differences in the subclass states’ laws and Plaintiffs’ failure to demonstrate how a trial on common issues would proceed in light of them, Plaintiffs have not met their burden to show that common issues would predominate for the proposed subclasses.²²

C. Individual Factual Issues Predominate Regarding Exposure, Reliance, and Materiality

Plaintiffs are entitled to a classwide inference of reliance *only if* they can show “(1) that uniform misrepresentations were made to the class, and (2) that those misrepresentations were material.” *Darisse*, 2016 WL 4385849, at *5 (quoting *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 571 (C.D. Cal. 2014)). Plaintiffs have not shown classwide exposure to uniform AFR and RAID representations because (1) there is no evidence Seagate ever published AFRs for External Products,

²¹ To the extent this Court is inclined to certify subclasses, Plaintiffs Crawford and Manak’s claims under the consumer protection laws of New York and Texas, respectively, would be time-barred, rendering them inadequate representatives and their claims atypical. *See Payne Decl.*, Exs. 24 at 39:23-25 (Crawford Deposition, showing he purchased his drive in 2012) & 22 at 24:24-25:2 (Manak Deposition, showing he purchased his drives in 2013); SCAC ¶¶ 186, 211. *See also Becerra v. General Motors LLC*, 241 F. Supp. 3d 1094, 1115-16 (S.D. Cal. 2017) (dismissing named plaintiff’s claim under Texas Deceptive Trade Practices Act as time-barred and declining to apply relation-back doctrine); *Jordan v. Paul Financial, LLC*, No. C 07-04496 SI, 2009 WL 192888, at *3 (N.D. Cal. Jan. 27, 2009) (holding named plaintiff did not have standing to represent class where his claim was barred by the statute of limitations).

²² A California subclass also would not be superior under Rule 23(b)(3)(B) as it would be duplicative of the action pending in San Francisco Superior Court, in which Judge Curtis Karnow granted certification as to state plaintiffs’ omissions claims under the CLRA and the fraudulent prong of the UCL *Payne Decl.*, Ex. 31 (Order Granting in Part Pls.’ Mot. for Class Cert. at 33, *Pozar v. Seagate Technology LLC*, No. CGC-15-547787 (S.F. Super. Ct. Nov. 1, 2017)).

1 (2) product packaging for the Internal Products contained no AFR representations, (3) Seagate did
2 not consistently publish AFRs of Internal Products, and (4) RAID representations were made only
3 as to Internal Products and the Business 2- and 4-Bay NAS. *See* Sections II(A), IV(A), *supra*.

4 Nor have Plaintiffs shown that representations regarding RAID and AFR were common or
5 material to the class. Under California law, “[a] misrepresentation is judged to be ‘material’ if ‘a
6 reasonable man would attach importance to its existence or nonexistence in determining his choice
7 of action in the transaction in question’. . . .” *See Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 332
8 (2011). Here, AFRs could not have been common or material to buyers of External Products or
9 those who purchased based solely on the box (which would be most brick-and-mortar store
10 shoppers), because they were never exposed to AFR representations. At best, Plaintiffs’ evidence
11 shows that only purchasers of Internal Products who went on Seagate’s website and viewed either
12 (1) the specifications tab or downloadable Data Sheets on the Internal Products’ pages no earlier
13 than October 23, 2011, (2) the Product Manual after January 2015, or (3) the Storage Solutions
14 Guides, could have been exposed to and relied on AFR representations. Payne Decl. ¶ 9-10;
15 Schweiss Decl., ¶ 11, Exs. 19-27. Moreover, even assuming common representations, Plaintiffs still
16 cannot establish classwide materiality in light of Simonson’s finding that consumers’ purchasing
17 decisions did not change in any statistically significant way when presented with Data Sheets that
18 included AFRs of <1% vs. <8%. Simonson Decl. ¶ 37. Regarding RAID, there were no RAID
19 representations as to nearly all External Products, and not even all of the named plaintiffs considered
20 RAID suitability in purchasing their Drives. Further, even Plaintiffs’ own expert concludes that
21 RAID suitability was statistically immaterial. Boedeker Decl. ¶ 158.

22 Plaintiffs have not established the common materiality of Seagate’s alleged AFR and RAID
23 misrepresentations, *see* Section IV(A), *supra*, and cannot show that these representations were
24 uniformly made to all members of the proposed class. *See* Section II(A), *supra*. Accordingly, there
25 can be no presumption of reliance or materiality, and therefore individualized factual inquiries will
26 be necessary to determine: (1) whether AFR or RAID representations appeared on Seagate’s website
27 or other product-related materials at the time of each class member’s purchase for the product
28 purchased; (2) whether the class member saw either or both representations; and (3) whether the

specific product purchased in fact had a higher failure rate during the time period in question such that Seagate owed a duty to counter its affirmative representations.

D. The Proposed Class Is Neither Manageable Nor Superior

Rule 23(b)(3) requires a finding that a class action is superior to other available methods of adjudication, in light of (1) class members' interests in individually controlling their claims, (2) the extent and nature of any litigation already begun by class members, (3) the desirability of concentrating the litigation in a particular forum, and (4) the likely difficulties in managing a class action. Fed. R. Civ. P. 23(b)(3)(A)-(D). As discussed above in Sections II(A) and IV(A), Plaintiffs' motion proposes a grossly overbroad class that includes many members who were never exposed to the allegedly misleading AFR and/or RAID claims, and hence "are not entitled to recover." *See Dudum v. Carter's Retail, Inc.*, No. 14-cv-00988-HSG, 2016 WL 946008, at *5 (N.D. Cal. Mar. 14, 2016); *see also Pfizer, Inc. v. Super. Ct.*, 182 Cal. App. 4th at 632-33.²³ Plaintiffs thus fail the "implied prerequisite" of providing a class definition that allows for a manageable resolution of class claims. *Mazur v. eBay Inc.*, 257 F.R.D. 563, 567 (N.D. Cal. 2009).²⁴

Moreover, any attempt to address the class' overbreadth highlights the issues that render certification of any class improper. Without a widespread marketing campaign, to determine who was actually exposed to the allegedly deceptive statements, the Court would have to examine whether purchasers: (1) reviewed Seagate's website containing the Data Sheets, Product Manuals, or

²³ In *Pfizer*, plaintiffs sought certification of UCL and FAL claims challenging Pfizer's claim that its Listerine mouthwash product was "as effective as floss." The record indicated that 19 of 34 different Listerine bottles did not contain the challenged claim. *Id.* at 632. The Court of Appeal reversed certification of a class of all Listerine purchasers, explaining that "perhaps the majority of class members who purchased Listerine during the [class period] did so not because of any exposure to Pfizer's allegedly deceptive conduct, but rather, because they were brand-loyal customers, or for other reasons." *Id.* at 632. *See also Red v. Kraft Foods, Inc.*, No. CV 10-1028-GW (AGRx), 2011 WL 4599833, at *5 (C.D. Cal. Sept. 29, 2011) (denying certification where allegedly false and misleading claims did not appear on all product packaging versions plaintiffs sought to include).

²⁴ The class definition is further overbroad because it only includes a class cutoff date, unbounded by any start date. Not. of Mot. at i:9-ii:5. A class is overboard if it "does not specify a time period for the proposed class, which means the definition is not limited to class members who come within the applicable statute of limitation." *Erickson v. Elliot Bay Adjustment Co.*, No. C16-0391 JLR, 2017 WL 1179435, at *11 (W.D. Wash. Mar. 30, 2017); *see also Berndt v. Cal. Dept. of Corrections*, Case No. C 03-3174 PJH, 2012 WL 950625, at *12 (N.D. Cal. Mar. 20, 2012) ("[S]ince it is impossible to tell from plaintiffs' evidence or argument which or how many class members fall within the appropriate statute of limitations period, the class is simply not ascertainable as currently pled.") Perhaps this is because Plaintiffs tacitly acknowledge the start date would vary based on the statute of limitations for each state subclass.

1 Storage Solutions Guides; (2) if they accessed any of these publications, were they the versions that
 2 contained AFR and/or RAID representations; if so, (3) did the consumer purchase one of the
 3 products that had one of the alleged misrepresentations; (4) if so, was the representation actually
 4 false with regard to drives manufactured at that time; (5) is that class member's claim barred by the
 5 statute of limitations under the laws of his or her jurisdiction; and (6) if not, has the class member
 6 stated a claim under the applicable laws of her jurisdiction? These multiple inquiries would lead to
 7 "mini-trials," which class actions are designed to avoid. As a result, a class action would not be
 8 superior to other means of resolving this dispute. Fed. R. Civ. P. 23(b)(3).

9 **VI. PLAINTIFFS' DAMAGES MODEL IS FACTUALLY AND LEGALLY UNSOUND;**
 10 **BOEDEKER'S DECLARATION SHOULD BE STRICKEN**

11 The Boedeker Declaration purports to set forth a class-wide damages model. The model, in
 12 turn, is based on a conjoint study in which purported hard-drive consumers were surveyed about a
 13 limited set of preselected product features to arrive at a dollar value for Seagate's purported
 14 omissions with respect to the Drives' AFR and suitability for use in RAID or NAS configurations.
 15 The conjoint study, however, is so fundamentally flawed in its conception and execution as to
 16 render Boedeker's report and conclusions inadmissible under *Daubert v. Merrell Dow Pharms. Inc.*,
 17 509 U.S. 579, 589 (1993); *see generally* Simonson Decl. at ¶¶ 14-20; 42-76.

18 More fundamentally, Boedeker's opinion is irrelevant because it fails to meet the applicable
 19 standard for a class-wide damages model under *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013).
 20 *Comcast* requires plaintiffs "to show their damages *stemmed from* defendant's actions that created
 21 the legal liability." *Levy v. Medline Indus., Inc.*, 716 F.3d 510, 514 (9th Cir. 2013) (emphasis
 22 added). But Boedeker's analysis is based on his assumption *that it does not matter if consumers*
 23 *even saw the published AFR*; the "market equilibrium" price nevertheless somehow reflects its value
 24 and can be used to compute "damages." Simonson Decl. ¶ 70 (quoting Boedeker Depo. at 223:10-
 25 225:9). Such a model cannot determine damages in a case based on alleged consumer *deception*,
 26 where Plaintiffs must show that the putative class as a whole suffered harm *as a result of* common,
 27 material representations and omissions. Boedeker's opinions should be stricken not only because
 28

1 they are based on a flawed study, but because they are irrelevant.²⁵

2 **VII. HOSPODOR'S DECLARATION SHOULD LIKEWISE BE STRICKEN**

3 The Hospodor Declaration purports to set forth Plaintiffs' scientific evidence of a "higher"
4 AFR and "unreliability" such that Seagate's contrary representations with regard to the Drives at
5 issue were commonly false and material to the proposed class. It does not and cannot do so.
6 Therefore, Hospodor's entire declaration is improper and irrelevant and should be stricken.

7 First, it is axiomatic that expert testimony on class certification must relate to issues "that
8 could affect the class as a whole." *See In re 5-Hour Energy Marketing and Sales Practice*
9 *Litigation*, 2017 WL 2559615 at *3 (C.D. Cal. June 7, 2017). Here, Hospodor admits that he has
10 provided only "examples," and *does not opine* that any issues, or a "high" AFR, were *common* to
11 the drives and products, or among the named plaintiffs and the class. Payne Decl., Ex. 11 at 49:7-
12 52:25, 54:17-55:5, 125:19-128:14; 255:3-256:16. In fact, he presents no such evidence. Adams
13 Decl., §§ VI, VIII, ¶¶ 23, 81. In particular, Hospodor's "evidence" and opinions of "unreliability" in
14 paragraphs 118-212 of his declaration (discussion of yield, ECRs, firmware releases, ship holds,
15 etc.) are *limited to* 2011-2012 (or May 2013 at the latest), and with minor exceptions, to the Grenada
16 *Classic* drives. Adams Decl., § VIII, ¶¶ 23, 81. A limited number of statements about a subset of
17 products at certain points in time cannot provide evidence as to any common issues of law or fact.

18 Second, Plaintiffs' theory, and Hospodor's opinions, are that Seagate published one AFR for
19 the drives, but that the "true" AFR was "higher than advertised." However, much of Hospodor's
20 declaration is not the proper subject of expert testimony. He admits that a layperson can read and
21 interpret Seagate's consumer-facing representations about the Drives. Payne Decl., Ex. 11 at
22 315:22-317:13. Thus, Hospodor's opinions in paragraphs 44-58 regarding the "advertised" AFRs
23 are improper.²⁶ Moreover, the bulk of Hospodor's evidence and opinion about the "true" AFR is
24

25 ²⁵ After reviewing the Court's opinion in *Kamakahi v. Am. Society for Reproductive*
26 *Medicine*, No. 3:11-cv-01781-JCS, 2014 WL 7183629 (N.D. Cal. Dec. 15, 2014) regarding the
27 application of Local Rule 7-3 to *Daubert* motions. Seagate asked Plaintiffs to stipulate to a proposed
28 order permitting *Daubert* motions to be filed separately and within one week of the Opposition and
Reply papers, respectively. Plaintiffs declined. Accordingly, Seagate has confined its challenges to
Plaintiffs' expert evidence to this memorandum and expects that Plaintiffs will do the same on reply.

²⁶ Hospodor's statements and conclusions that AFRs were "higher than advertised" or some
number of "times higher than advertised" should likewise be stricken because they are simply an

1 based on construing Seagate documents about *External Products*. Adams Decl., § VI.A. Because
 2 Seagate did not publish an AFR for such products, Hospodor’s evidence cannot support his opinions
 3 that the “true” AFR was “higher than advertised,” and the evidence and opinions are therefore
 4 irrelevant to certification. The remainder of Hospodor’s opinions regarding the purported “true”
 5 AFRs of Seagate drives are based on speculation and misinterpretations of a handful of internal
 6 Seagate documents. Adams Decl., §§ VI.B, VI.C. Hospodor provides no evidence to support
 7 unsubstantiated personal interpretations of these documents, and his purported “expertise” alone is
 8 insufficient. *See Daubert*, 509 U.S. at 590 (defining expert knowledge as “more than subjective
 9 belief or unsupported speculation”); *see also Pooshs v. Philip Morris USA, Inc.*, 287 F.R.D. 543,
 10 548 (N.D. Cal. 2012) (“interpreting’ [defendant’s] company documents would not assist the jury
 11 because those documents speak for themselves”). These opinions are based on neither reliable
 12 methodology nor sufficient evidence, and hence are inadmissible. *See General Elec. Co. v. Joiner*,
 13 522 U.S. 136, 146 (1997) (upholding exclusion of opinions because “nothing in either *Daubert* or
 14 the Federal Rules of Evidence requires a court to admit opinion evidence that is connected to
 15 existing data only by the *ipse dixit* of the expert”).

16 Finally, Hospodor’s claim that Seagate’s method for calculating AFR underestimated the
 17 “true” AFR of the Drives is not the product of accepted principles of reliability analysis correctly
 18 applied to Seagate’s documents and data (which is the only evidence he considered). Adams Decl.,
 19 § VII. These opinions are therefore inadmissible as well. *See Perez v. State Farm Mut. Auto Ins.*
 20 *Co.*, 2012 WL 3116355 at *5-6 (N.D. Cal. July 31, 2012) (rejecting expert who failed to identify a
 21 methodology and relied only on documents sent to him by plaintiff’s counsel).

22 **VIII. CONCLUSION**

23 For the foregoing reasons, the Court should deny Plaintiffs’ motion for class certification.

24 Dated: January 5, 2018

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

25 By /s/ Anna S. McLean

26 ANNA S. McLEAN
 Attorneys for Defendant
 SEAGATE TECHNOLOGY LLC
 27

28 improper attempt to testify that Seagate “advertised” a specific AFR, a matter as to which Hospodor
 has neither personal knowledge nor professional expertise.